FILE COPY

FILED
AUG 21 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.
No. 426

WESTERN AIRLINES, INC., a corporation,
Petitioner,

vs.

HILDA OGDEN BRATT; BARBARA ANN BRATT, a minor, by her guardian *ad litem*, Hilda Ogden Bratt; JOAN NANCY BRATT, a minor, by her guardian *ad litem*, Hilda Ogden Bratt,
Respondents.

Petition for a Writ of Certiorari and Points and Authorities in Support Thereof.

ARTHUR E. MORETON,
432 Judge Building, Salt Lake City 1, Utah,
FORREST A. BETTS,
419 Title Insurance Building, Los Angeles 13, Calif.,
Counsel for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

SUBJECT INDEX.

PAGE

Opinion below 2

The jurisdiction of the United States Supreme Court..... 2

Questions presented 5

Summary and short statement of the matter involved..... 6

Reasons for granting the writ..... 16

Argument 19

I.

The doctrine of res ipsa loquitur is a matter of substantive law to be determined by the local law in keeping with the case of Erie Railway v. Tompkins..... 20

II.

The Circuit Court of Appeals erred in substituting its judgment for that of the trial court with reference to the competency of the witness Lee..... 29

The decision transgresses the rule that errors in the admission or exclusion of evidence must be prejudicial before the reversal of the judgment of the trial court is justified 30

Conclusion 33

Opinion of the Circuit Court of Appeals, Tenth Circuit....App. p. 1

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Bryan v. Bingham State Lines, 60 Utah 299, 208 Pac. 541	2
Chicago and Northwestern Ry. Co. v. Fred Golay, No. 3195, May 21, 1946	2, 32
Cohn v. United Airline Transport Company, 17 Fed. Supp. 865	5
Dearden v. San Pedro, L. A. & S. L. R. Co., 33 Utah 147, 93 Pac. 271	22
Empire State Cattle Co. v. Atchison, etc. R. Co., 210 U. S. 1, 28 S. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70	27
Erie Ry. v. Tompkins, 304 U. S. 64	5, 15, 16, 24, 25
Johnson v. U. P. Coal Co., 28 Utah 46, 76 Pac. 1089	3
Korth v. Zion's Savings Bank, 148 F. (2d) 170	2
Loos v. Mountain Fuel Supply Co., 99 Utah 496, 108 P. (2d) 254	3, 23, 24
Morrison v. LeTourneau Co., 138 F. (2d) 339	5
McMullen v. Hoffman, 174 U. S. 639, 19 S. Ct. 839, 43 L. Ed. 117	28
Neesley v. Southern Pac. Co., 35 Utah 259, 99 Pac. 1067	3, 32
Sampson v. Channell, 110 F. (2d) 754, 128 A. L. R. 394	24
Siecocinski v. Dupont, 118 F. (2d) 531	5
Smith v. Pacific Alaska Airways, Inc., 89 F. (2d) 253	5
Spiller v. Atchison, etc. R. Co., 253 U. S. 117, 40 S. Ct. 466, 64 L. Ed. 810; reversed 246 Fed. 1, 158 C. C. A. 227	28
Spring Co. v. Edgar, 99 U. S. 645, 25 L. Ed. 487	3
Swan v. Salt Lake and Ogden Railway Co., 41 Utah 518, 127 Pac. 267	3
Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520	2
United States Smelting Company v. Parry, 166 Fed. 407, 92 C. C. A. 159	2, 3

PAGE

Western Coal & Mining Co. v. Berberich, 36 C. C. A. 364, 94 Fed. 329 4

Woods, In re, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125..... 27

STATUTES.

Federal Rules of Civil Procedure, Rule 61.....6, 14, 31

Judicial Code, Sec. 240(a)..... 2

TEXTBOOKS.

American Law Reports, pp. 400, 404-405..... 25

American Law Reports, Vol. 128, p. 408, note..... 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

WESTERN AIRLINES, INC., a corporation,
Petitioner,

vs.

HILDA OGDEN BRATT; BARBARA ANN BRATT, a minor, by her guardian *ad litem*, Hilda Ogden Bratt; JOAN NANCY BRATT, a minor, by her guardian *ad litem*, Hilda Ogden Bratt,
Respondents.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the United States Supreme Court:

Now comes Western Airlines, Inc., a corporation duly organized under the laws of the State of Delaware, and respectfully petitions this Court to issue a Writ of *Certiorari* directed to the Circuit Court of Appeals for the Tenth Circuit, to review its decision herein, reversing the judgment of the Trial Court.

Opinion Below.

The opinion of the Circuit Court of Appeals of the Tenth Circuit is dated May 20th, 1946, and a copy thereof is in the record. This opinion has not yet been reported. The case was heard before Judges Phillips, Huxman and Murrah. Following the decision, your petitioner filed a Petition for Rehearing, which Petition was denied on July 15, 1946.

The Jurisdiction of the United States Supreme Court.

The jurisdiction of this Court to review the decision of the Circuit Court of Appeals of the Tenth Circuit, is invoked under Section 240(a) of the Judicial Code, as amended by the act of February 13, 1925, for the following special and important reasons:

A. The decision herein is contrary to and in conflict with the rule of law established by it, in the case of *Korth v. Zion's Savings Bank* (Utah 10th Circuit Ct. 1945) 148 F. (2d) 170, and in conflict with its decision in the *United States Smelting Company v. Parry* (Utah 1909) 166 Fed. 407, 92 C. C. A. 159, and with its recent decision in the case of *Chicago and Northwestern Ry. Co. v. Fred Golay,* No. 3195, May 21, 1946, and with the decision of the Supreme Court of the United States in the case of *Tennant v. Peoria & P. U. Ry. Co.,* 321 U. S. 29, 64 S. Ct. p. 409, 88 L. Ed. 520.

B. The Circuit Court of Appeals, by its decision herein, has decided an important question of law in conflict with applicable local decisions of the Supreme Court of the State of Utah.

Bryan v. Bingham State Lines, 60 Utah 299, 208 Pac. 541;

Swan v. Salt Lake and Ogden Railway Co., 41 Utah 518, 127 Pac. 267;

Johnson v. U. P. Coal Co., 28 Utah 46, 76 Pac. 1089;

Neesley v. Southern Pac. Co., 35 Utah 259, 99 Pac. 1067;

Loos v. Mountain Fuel Supply Co., 99 Utah 496, 108 Pac. (2d) 254.

C. The Circuit Court of Appeals by its decision herein has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's supervision.

In the case of *U. S. Smelting Co. v. Parry* (Utah 1909), 166 Fed. 405, 92 C. C. A. 159, the Eighth Circuit, in an opinion written by Judge Van Deventer, said:

> "And it is in keeping with this modern tendency that it is now generally held, as stated in *Chicago Great Western Ry. Co. v. McDonough* (C. C. A.), 161 Fed. 657, 662, and in the cases cited there, that whether or not a witness tendered as an expert is qualified to testify as such rests largely in the discretion of the trial judge, and that his decision thereon ought not to be disturbed, unless it can be said that it was manifestly erroneous. . . ."

Further, the court then quoted from *Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487, wherein the Supreme Court said:

> "Cases arise where it is very much a matter of discretion with the court, whether to receive or exclude the evidence, but the appellate court will not reverse such a case, unless the ruling is manifestly erroneous."

Continuing, the Court quoted from *Western Coal & Mining Co. v. Berberich*, 36 C. C. A. 364, 94 Fed. 329, as follows:

> "But there is nothing which tends to belittle the authority of the courts or to impair the confidence of the public in the certainty of justice as much as the habit of reversing cases for slight errors in admitting testimony or trifling slips in the charge. . . . Better by far, the practice of the English Courts and the Federal Supreme Court, where every intendment is made in favor of the lower court and cases are rarely reversed, except for errors going to the very merits—errors which usually obviate the necessity of a second trial."

It is to be borne in mind that it was the duty of the jury to determine what was "the cause of the accident." It has never been the province of experts to determine that issue for juries. The alleged expert, Mr. Lee, the record will display was not asked what his opinion was concerning the cause of the failure of the wing-tips and stabilizer metal—he was asked to invade the province of the jury by determining what was the cause of the accident. This, we submit, is in direct conflict with the decisions above quoted, with the decisions which have been heretofore handed down in the Tenth Circuit, as well as in every other circuit of the courts of appeal, and by this court.

The departure of the present decision of the Tenth Circuit Court of Appeals from the long established rules of law, as laid down by the cases herein cited and heretofore cited in our brief, is of such a serious character as to suggest that law should be set on a true course, either one way or the other.

Questions Presented.

1. Whether the Federal Courts, pursuant to the principles laid down in the *Tompkins* case *(infra)* must follow, as a rule of substantive law, the decisions of the State Court with reference to pleadings and proof in *res ipsa loquitur* cases, particularly those involving accidents on passenger airliners. In *Siecocinski v. Dupont*, 118 Fed. (2d) 531 (3rd Cir.), that court held that the doctrine of *res ipsa loquitur* is a matter of substantive law to be determined by the local law in keeping with the spirit of *Erie Ry. v. Tompkins*, 304 U. S. 64. This question is important and so far as we can ascertain, has not been passed upon by this court. In this connection it is pertinent to remark that the Federal as well as the State Courts are not in accord as to whether or not the doctrine of *res ipsa loquitur* is applicable to cases of this kind, most of which involve interstate commerce. The 3rd Circuit Court of Appeals in the case of *Morrison v. LeTourneau Co.*, 138 Fed. (2d) 339, and the District Court of Wyoming (10th Circuit) in the case of *Cohn v. United Airline Transport Company*, 17 Fed. Supp. 865, held that the doctrine does not apply in cases of this sort. The decision in the case of *Smith v. Pacific Alaska Airways, Inc.*, 89 Fed. (2d) 253, is to the contrary. While there are no Utah decisions at to whether the doctrine is applicable to airline cases, it is our contention that inasmuch as the trial Court submitted the case to the jury on that theory, that the decisions of the Utah State Court, with reference to *res ipsa loquitur* cases in general are rules of substantive law to be followed by the Federal Courts, and that, pursuant to such decisions of the Utah Court, the trial Court did not err, as the Circuit Court of Appeals held that it did, in excluding the offer of proof of

specific negligence, in the absence of allegations to that affect.

2. Whether the decision of the Circuit Court of Appeals herein is such a departure from well established rules of evidence as ennunciated by this Court, by the Supreme Court of the State of Utah and by the authorities generally, as to justify the supervision of this Court by a review thereof.

3. Whether the decision of the Circuit Court of Appeals reversing the judgment of the trial Court for refusal to admit certain evidence is in conflict with Rule 61, of the Rules of Civil Procedure for Federal Courts and the ~~status~~ statutes and decisions of this Court and of that Court, governing appeals, *to the effect that no error in the exclusion of evidence is ground for reversal by the Appellate Court, unless it clearly appears that such error is prejudicial and affects the substantive rights of the parties.*

Summary and Short Statement of the Matter Involved.

Plaintiffs, citizens and residents of Utah, brought this action against your petitioner, Western Airlines, Inc., a corporation of the State of Delaware, to recover from the petitioner damages for the alleged wrongful death of her husband on December 15, 1942. The plaintiffs in their Complaint, alleged:

> "That the said defendant at all times prior to and during said flight had exclusive control and management of the said airplane in which the said Jack Raymond Bratt was riding as a passenger aforesaid, and the accident resulting in his injury and death was such that in the ordinary course of things it would not have occurred had the defendant exercised

proper care; that both before and after said accident the defendant had the sole and exclusive possession and custody of said airplane, its parts and appurtenances, and the wreckage thereof, and is possessed of superior, if not exclusive, access to information concerning the precise cause of said accident; and the plaintiffs rely herein upon the negligence of the defendant as inferred from the general situation herein alleged." [Tr. 11-12.]

The defendant for its answer alleged:

"Denies generally and specifically each and all of the allegations set up in amended paragraph V of the Complaint; and in that connection alleges that at all times after the airplane began its take-off run, and particularly after it became airborne, and until the accident complained of began to occur, the said airplane was partially controlled by and subject to the reactions of the elements of the air and weather conditions there existing, and further alleges that the inherent nature and risk of air travel at great speed and altitude involves a risk of travel inherent in its nature, in that such travel was subject to unusual dangers or perils necessarily incident to the exposure to the elements involved in such transportation by air, and alleges that these risks and hazards in the mode of travel, insofar as they were beyond the control of human action, and insofar as they could not be compensated for by the exercise of the highest degree of care, were risks and hazards assumed by the deceased at the time he purchased the transportation for such travel and actually became a passenger in the airplane for the purpose of the consummation thereof." [Tr. 12-13.]

The plaintiffs pleaded and relied, as will be observed, on the doctrine of *res ipsa loquitur*. No specific negligence was charged.

The case was fully tried to a jury to which all pertinent, material and relevant evidence that was offered by either party was presented; and an abundance of testimony was offered by both parties, as an examination of the 779 pages of printed record will disclose.

As the Circuit Court of Appeals states in its decision, herein "the case was submitted to the jury on the doctrine of *res ipsa loquitur.*" [See Instructions, Tr. 758.] It was unnecessary for the plaintiffs to allege or attempt to prove specific acts of negligence. Further, as we shall hereinafter point out, under the decisions of the Supreme Court of the State of Utah, which we submit is the applicable law governing the rules with respect to *res ipsa loquitur,* the plaintiffs, inasmuch as they alleged negligence generally, and not specifically, relying wholly upon the doctrine of *res ipsa loquitur,* were not entitled to offer proof of specific acts of negligence, and could not be prejudiced by the exclusion thereof! Nevertheless, the Circuit Court of Appeals reversed the decision of the trial Court herein, upon the ground that the trial Court erred in refusing to admit evidence of specific negligence and "the cause of the accident."

It was for the jury to determine from the evidence what was the construction, as well as the condition, of the plane, prior to its flight, the amount of use it had had, its age, the maintenance and inspection thereof, its flying qualities, the manner of its operation at the time of the accident, the skill or lack of skill of its pilot—on all of which there was an abundance of testimony—and as against this to weigh the inference of negligence under the very favorable doctrine of *res ipsa loquitur,* drawn in favor of the plaintiffs and against the defendant, and with the benefit of such inference, and upon

such testimony of due care or lack of care, to arrive at a conclusion as to whether or not the defendant was negligent under the circumstances.

The jury returned a verdict for the defendant. The findings implied by such a verdict was that defendant gave such sufficient explanation of the facts and circumstances at to rebut the inference of negligence. The jury was instructed specifically by the Court that, unless the defendant so explained the accident to the satisfaction of the jury, it should render a verdict in favor of the plaintiffs. [see Tr. 758-759.]

No exceptions were taken to the instructions so given by the Court, which covered fairly and fully every phase of the case, as an examination thereof will demonstrate.

The case was tried upon the theory, as stated by the Circuit Court of Appeals in its decision, that "it seemed to be agreed that the accident was caused by structural failure in flight."

That such was the case is further evidenced by the following, taken from *plaintiff's* brief on appeal herein:

> "It appeared without dispute that the left wing tip and the right horizontal stabilizer failed in the air. * * *
>
> "Defendant presented a considerable volume of evidence with reference to the inspection, maintenance and operation of the plane. Several pilots testified that this particular aircraft had always functioned normally and safely [348, 361, 395, 417]. Other witnesses testified with reference to inspection and maintenance rules and practices generally and also as applicable to the aircraft involved, but the weight and credibility of this testimony was admittedly for the jury.

"Suffice it to say here, that the trial court submitted the case to the jury upon the doctrine of res ipsa loquitur, and the sufficiency of the evidence to warrant its submission is not involved upon the present appeal."

Notwithstanding, the Circuit Court of Appeals in its decision herein, reversed the judgment of the trial Court, based on the verdict of the jury, of "No Cause of Action." and remanded the case for new trial, upon the sole grounds that the trial Court should have (1) permitted a witness by the name of Lee to testify as to *which portion of the structure of the plane failed first,* and as to what, in his opinion, caused the accident; and (2) permitted Welcher, a farmer, who lived some four or five miles from the scene of the accident, to testify that at or near the time of the accident he heard the noise of motors of a plane, which seemed "to come on and go off." No contention was ever made that the crash was due to motor trouble. As the Circuit Court of Appeals says in its decision herein "Over objections of counsel, the court permitted him (Lee) to describe the purpose of ailerons, stabilizers and rudders, and to discuss the various parts and structures of an airplane, with reference to their purpose and function in flight. *In short, the court permitted him to testify concerning all the issues in the case, except to express an expert opinion as to the cause of the accident.*" (Italics ours.)

The trial Court ruled that the witness Lee was not qualified as an expert. Its determination of that question, as has been held by this Court, was "the determination of an issue of fact," carrying the same weight as the finding of a jury on a disputed question of fact, and it should not be disturbed by a reviewing Court, unless

error is manifest. The rule is based upon the fact that the trial Court had the opportunity to see and observe the witness and appraise his qualifications.

The trial Court excluded the proffered testimony of Mr. Lee, as to the sequence of failure of various parts of the structure of the plane, because he had not qualified as an expert. Under the decisions of this Court and the generally accepted law upon the subject, its ruling as to Mr. Lee's qualifications is conclusive, unless such ruling is "manifestly erroneous." It is apparent, from a reading of the decision of the Circuit Court of Appeals herein, that that Court did not hold that such ruling was "manifestly erroneous." The Appellate Court did hold that the trial Court, "in determining the qualifications of the witness (Lee) as an expert applied the wrong legal standards." Nevertheless, the Appellate Court did not point out what are the proper legal standards, and, in holding that the trial court had applied the wrong legal standards, the Appellate Court departed from its own decisions, as well as those of this Court and those of the State of Utah, with reference to the qualifications of an expert. The ruling of the trial court in this respect was peculiarly within its province and the established law in this Court and in every jurisdiction is that the ruling of the trial court, with respect to the qualifications of an expert shall not be reversed, unless shown to be "manifestly erroneous." To dispose of the question, as the Appellate Court did, by simply stating that the trial court "applied the wrong standards," is a pure conclusion, without any authority to sustain the same, and contrary to all of the decisions of this Supreme Court and of that Appellate Court, as well as those of the State of Utah, and is without precedent in law. Such a ruling does not

comport with established rules governing appellate procedudure, nor with well established principles of law. We cannot but feel that the Appellate Court did not agree with the verdict of the jury herein, and that in making the ruling that it did, with reference to the evidence hereinbefore referred to, it subconsciously substituted its own judgment for that of the jury upon the facts at issue. We regretfully arrive at this conclusion, which is also based upon the following language in the decision of the Appellate Court:

> "if we close the door to testimony of this quality, in cases of this kind, we are brought to a point in the law of torts, as applied to aviation, where it would be impossible to prove a case, except by the testimony of someone who actually experienced an accident of this kind, or who bases his opinion upon a scholastic background. We do not understand that such is or should be the policy of the law."

As we shall hereinafter point out, the sequence of the failure of the structural parts of the plane was wholly immaterial, because whether the wing tips or the stabilizer failed first is wholly immaterial in view of the fact that, as the Appellate Court held, "it seems to be agreed that the accident was caused by a structural failure in flight."

Furthermore, it is said in the decision of the Appellate Court, "In short the (trial) court permitted him (Lee) to testify as to all of the issues in the case, except to express an expert opinion as to the cause of the accident."

Such being the case, it is manifest that the ruling of the trial court, with reference to the testimony of Lee was correct. No case is cited in the decision of the Appellate Court, nor can any case be found, holding that a witness, be he expert or otherwise, may be permitted to testify "as to the cause of an accident," and thereby usurp the functions of the jury.

The trial court properly excluded the testimony of the witness Welcher, a farmer, who resided four or five miles from the scene of the accident, to the effect that at or near the time of the accident he heard a noise of motors of a plane that seemed "to come on and go off," for the reason that no contention was ever made that the crash was due to motor trouble, but on the contrary, as stated by the Appellate Court "it seemed to be agreed that the accident was caused by a structural failure in flight," and by that is meant a failure of the plane itself, or some component part thereof. Furthermore, such testimony was wholly immaterial and could not possible have been "merely a circumstance to aid the jury" in determining the ultimate question, particularly in its province, as the Appellate Court suggested it might. No foundation identifying the plane was laid. In fact counsel for plaintiff, at the time of the offer of this testimony said "it is true that the witness can't say for a surety that this was the plane." [Tr. 171.]

Under such circumstances such evidence had no probative value and was wholly immaterial. The decision of the Circuit Court of Appeals, reversing the judgment

of the trial court, founded upon the jury's verdict of "No Cause of Action," is based wholly upon the alleged error of the trial court in failing to admit the testimony hereinbefore referred to. It should be evident from the statement of the foregoing facts, and without resort to the authorities hereinafter quoted, that the trial court applied the proper legal standards, and that in arriving at its decision to reverse this case, the Circuit Court of Appeals itself, so departed from established law as laid down by this Court, and by the Supreme Court of the State of Utah, and by all of the authorities generally, as to call for the exercise of this Court's power of jurisdiction, to correct such departure from the accepted and usual course of judicial procedure.

The failure of the trial court to admit the proffered testimony did not affect the substantial rights of the plaintiff, nor did it constitute prejudicial error, as defined by rule 61 of the rules of civil procedure for federal courts and as established by the decisions of this Court, as well as those of the Tenth Circuit Court of Appeals, which in so far as the decision of the Circuit Court of Appeals in this case is concerned, were apparently overlooked.

All of the foregoing is based upon the assumption made by the Circuit Court of Appeals that in a *res ipsa loquitur* case, a plaintiff who relies wholly and solely upon *res ipsa loquitur* is entitled, in addition to the favorable inference that law accords to him to go further and, without allegations of specific negligence, proceed to give testimony as to the cause of the accident. As we shall

hereinafter point out in our brief, it is the law, as established by the Supreme Court of Utah, that if the plaintiff thus desires to go further than he is required to go, by offering proof of specific acts of negligence, he must *plead* the same in order that the defendant may be put on notice that the plaintiff is going to rely not only on the situation itself, to furnish an inference of negligence, but upon particular acts of negligence. However, it is true that under the Utah decisions the plaintiff can rely on specific acts of negligence and *res ipsa loquitur* in the same case, but to do so he must *allege* particular or specific acts of negligence, so that the defendant may be put on notice thereof.

May we emphasize most strongly that our contention with respect to the admissibility of the testimony in question goes deeper, and is more fundamental, than that applicable to a mere rule of evidence. It is our contention that the rules of law, as laid down by the Supreme Court of Utah with respect to the doctrine of *res ipsa loquitur*, are rules of substantive rights rather than procedural rights, within the purview of the *Tompkins* case, *supra*, and, that being true, the Federal Courts must follow the rule so established by the Supreme Court of the State of Utah.

So far as we have been able to ascertain this Court has not passed upon the question as to whether or not the *Tompkins* case requires the Federal Courts to follow state precedent on questions affecting the applicability of the doctrine of *res ipsa loquitur*. We further contend

that the doctrine of *res ipsa loquitur,* under the Utah decisions, materially affects the substantive rights of the parties, although in and of itself it may be considered as a part of the law of evidence, dealing with the sufficiency of proof to raise an inference of negligence on the part of the defendant. It is submitted under the circumstances aforesaid in this case that this rule of *res ipsa loquitur* is not a mere matter of procedure to be governed by federal precedent, but one of substantive law falling within the purview of the *Tompkins* case and to be governed by the state decisions upon the subject.

Reasons for Granting the Writ.

A. The controversy involves weighty and serious matters with respect to substantive and procedural rights in cases involving accidents on passenger airliners. The jurisdiction of this Court is invoked in the interest of jurisprudence and uniformity of decision, and for the purpose of guarding against inadvertance of conclusions in such controversies, and to remove doubt which seemingly has arisen with respect to the applicable law.

B. The public interest will be promoted by the establishment by this Court of a uniform rule of law.

C. The Circuit Court of Appeals, by its decision herein, departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

D. The decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of the United States.

E. The decision of the Circuit Court of Appeals is in conflict with previous and later decisions of that Court on the same matter.

F. The decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of the State of Utah.

WHEREFORE, the petitioner prays that a Writ of Certiorari may be issued from this Court to the Circuit Court of Appeals for the tenth Circuit, to certify the record to this court, to the end that the said case may be reviewed and determined by this Court as provided by law, and that the judgment of the Circuit Court of Appeals in this case may be reversed by this honorable Court.

ARTHUR E. MORETON,
FORREST A. BETTS,
Counsel for Petitioner.

State of Utah, County of Salt Lake—ss.

ARTHUR E. MORETON, being first duly sworn on oath deposes and says: That he is one of the attorneys for the petitioner in the above entitled action; that he prepared the foregoing petition, knows the facts stated in said petition and the proceedings had in said cause, and the facts stated therein are true to the best of his knowledge and belief.

ARTHUR E. MORETON.

Subscribed and sworn to before me this 16th day of August, 1946.

(Seal) PEARL CLEGG,

Notary Public, residing at Salt Lake City, Utah.

My Commission expires June 4, 1949.

Certificate of Counsel.

Comes now Arthur E. Moreton and certifies that it is his opinion that the foregoing petition is well founded as to matters of fact and as to matters of law, that it is not made for the purpose of delay, and that the decision of the Court in this case is erroneous and should be reviewed by this Honorable Court.

ARTHUR E. MORETON.

ARGUMENT.

The scope of this argument is restricted in view of the rather complete statement which is made in the Petition. We believe that it is important to the general public that decision of the Supreme Court be handed down in this new field of the law. It is our belief that the novelty of the field is the background transcending consequence. The field of aviation is new. Litigation with reference thereto is bound to be extensive: The question of whether or not the doctrine of *res ipsa loquitur* applies, and if so, in what manner it applies, is one of great public importance. The doctrine itself was initiated as one of convenience, and it is questionable whether or not the principal theory upon which it relies is applicable in aviation cases. As the trial court in this case commented in connection with the motion for new trial, it is not clearly shown that an airplane in flight is solely in control of the airline which owns and operates the same—it is possible that the elements of nature, and the long arm of The Almighty Being has some control after flight is begun.

The question of whether or not lay people, from their ground position, inexperienced in the technical relationships between engine sounds and causation, may testify in court, where those sounds are not even claimed to be related to the accident, surely is one of importance prospectively to the litigation which will increasingly present itself in the district courts of the Federal Government. The question of to what extent a person who merely reads and studies aerodynamics, and who shows no other qualification of learning, and can give no proof that he has been able to assimilate the things which he reads, shall be permitted to testify to the serious problems of aero-

dynamics, is one of great public importance. Most of us have read extensively of late concerning the atomic bomb and its effects, and yet probably all would concede that not more than a dozen or so of scientists are capable of discussing nuclear fission. Yet if that problem should come before a district court of the Federal Government, then, under the decision of the Circuit Court of Appeals in this case, anyone who had read extensively would be permitted to testify as to his opinion. The legal theory would be that, although he was not good, he was the best to be had. Certainly this matter, like the doctrine of *res ipsa loquitur*, in its application to this new field, is one of urgent outstanding importance to the public, whose relationship to air companies is bound to increase, possibly even by greater strides than those which we have experienced in the last five years.

I.

The Doctrine of Res Ipsa Loquitur Is a Matter of Substantive Law To Be Determined by the Local Law in Keeping With the Case of Erie Railway v. Tompkins.

The case was presented to the jury and tried wholly and exclusively upon the doctrine of *res ipsa loquitur*. Counsel for plaintiffs stated:

> "We want the record to be perfectly clear and I want it to show here that the plaintiff is relying squarely and strictly on the doctrine of *res ipsa loquitur*. We have notified counsel in the pleadings, in the depositions, in the pre-trial conference, and throughout the trial consistently. We don't want any question about that in the record." [Tr. 294.]
>
> "Your Honor, it is our contention that the facts and circumstances of this case, not merely the fact that

the plane fell but all of the attending circumstances, make a jury issue on the question of whether the defendant has exercised the highest degree of care under the doctrine of *res ipsa loquitur* for these reasons": [Tr. 355.]

> "Here in this case it is our position that *res ipsa loquitur* applies, and the burden of explanation, the burden of going forward with the evidence to show the precise cause is on the defendant, whether the zoom-up was caused by the conduct of the crew on the one hand or a defective horizontal stabilizer which failed and permitted the tail to go down and the nose to go up. The burden to show the precise cause is upon the defendant." [Tr. 356-7.]

The following is taken from the argument of the plaintiff to the jury:

> "Now, I believe the Court will also instruct you with reference to this doctrine of *res ipsa loquitur* and I want to go into it on this basis: that it is submitting the case to you entirely upon this basis." [Tr. 718.]

The trial Court submitted the case to the jury upon the doctrine of *res ipsa loquitur,* [Tr. pp. 757-771.] The Court instructed the jury, pursuant to plaintiff's theory, that it was incumbent upon the defendant "to come forward with proof that it exercised that degree of care * * * to free itself of an inference, which in this jurisdiction, Utah, arises from the happening of the accident * * * and it becomes your duty to determine whether or not that inference had been overcome, or not overcome * * * and that if it has failed to overcome, this inference, the plaintiffs would be entitled to a verdict. * * * [Tr. pp. 758-759.]

This instruction is in accordance with the rule of law announced by he Utah Supreme Court in the case of *Dearden v. San Pedro, L. A. & S. L. R. Co.*, 33 Utah 147, 93 Pac. 271, wherein the Court at pages 154 and 155 announced the rule as follows:

> "All that the plaintiff here was required to aver and prove to entitle him to recover was the relation of passenger and carrier, that the accident through which he received his injuries was connected with the means or instrumentality used by the defendant in the transportation, and an injury resulting therefrom. When such facts were shown, a prima facie presumption arose that the accident was occasioned by the defendant's negligence, and the burden was cast on it to show that it was not at fault and that the accident was not caused by its negligence. * * * A prima facie case of such negligence was proven by the showing of the circumstances of the collision heretofore referred to. That the plaintiff *averred* and undertook to show a defective brake chain as evidence of negligence causing the collision, did not waive nor affect the presumption of negligence arising from the circumstances, which was in itself sufficient to show such negligence. A relevant fact may frequently be proved in several different ways. The circumstances from which the presumption referred to arose were evidence for plaintiff of the fact of the defendant's negligence causing the collision. The evidence of a defective brake chain which the plaintiff produced was also some proof of such negligence, and was in aid of and not adverse to the presumption. And though he had failed in such proof, the presumption of negligence which had been shown to exist independent thereof was

in nowise displaced nor weakened. We are of the opinion that no error was committed in overruling the motion for nonsuit."

In the case of *Loos v. Mountain Fuel Supply Co.*, 99 Utah 496, 108 Pac. (2d) 254, the Utah Supreme Court said at page 258:

> "When a party without fault of his own is injured by an instrumentality under the exclusive control of another and such injury ordinarily would not occur if proper care were exercised, an inference may arise under the doctrine of res ipsa loquitur that the party controlling said instrumentality was negligent regardless of any proof of specific acts of negligence. But it is the province of the fact finder (the jury or the court where no jury is sitting) to draw or to reject such inference. See Zoccolillo v. S. L. Ry. Co., 53 Utah 39, 177 P. 201."

In that case the Utah Court further held:

> "One who wishes to rely on that doctrine (res ipsa loquitur) as well as specifically assigned acts of negligence, must so plead, either by a separate count, or by proper allegation, to the effect that the negligence to be inferred from the general situation caused the injury thereby notifying the other party that he intends to rely on the doctrine of res ipsa loquitur."

That case further establishes as the law of Utah that the plaintiff may rely upon *res ipsa loquitur* and upon acts of specific negligence, *provided both are pleaded.* However, in the instant case the plaintiff pleaded only negligence generally "as inferred from the general situation herein alleged." [Tr. p. 11-12.] Therefore, under the principles of law, announced by the Utah Supreme

Court in the *Loos* case, *supra,* the plaintiffs having pleaded and relied wholly upon *res ipsa loquitur,* were not entitled in any event to the admission of the evidence, the exclusion of which by the trial court was the ground asserted by the Circuit Court of Appeals for reversal of the verdict of the jury in this case. The trial court followed the decisions of the Utah Supreme Court, but the Appellate Court departed therefrom.

It is our contention that the decisions of the Utah Supreme Court, with reference to pleading and proof in *res ipsa loquitur* cases are rules of substantive law to be followed by the federal Courts, in keeping with the principles laid down by this Court in the case of *Erie Ry. v. Tompkins, supra.*

In the case of *Sampson v. Channell,* 110 Fed. (2d) 754, 128 A. L. R. 394, the Circuit Court of Appeals of the First Circuit held that in determining the incidence of burden of proof as to contributory negligence in a negligence case, the federal Court should regard the question as one of substantive law as to which it should follow the law of the State in which it sits. That court said:

> "It would be an over-simplification to say that the case turns on whether burden of proof is a matter of substance or procedure * * * it is unfair and unseemly to have the outcome of litigation substantially affected by the fortuitous existence of diversity of citizenship. * * * The incidence of burden of proof may determine the outcome of the case."

That court further said at page 400; 404 and 405; in A. L. R.:

"Assuming the state rule to be one way and the Federal rule the other, then the accident of citizenship becomes decisive of the litigation. The situation seems to call for the application of the rule in the Tompkins case. There is no important counter-consideration here, for the state rule can be easily ascertained and applied by the Federal court without any administrative inconvenience."

* * * * * * * *

"Until the point is finally ruled upon by the Supreme Court, lower courts must piece out as best they can the implications of the Tompkins case. The theory is that the Federal court in Massachusetts sits as a court coordinate with the Massachusetts state courts to apply the Massachusetts law in diversity of citizenship cases."

* * * * * * * *

"But under the Tompkins case the Massachusetts law must be determined by the state statutes and the common law as interpreted by the state courts, not by the Federal Courts' notion of 'general law'."

* * * * * * * *

"The explanation is that reasons of policy, set forth in the Tompkins case, make it desirable for the Federal court in diversity of citizenship cases to apply the state rule, because the incidence of burden of proof is likely to have a decisive influence on the outcome of litigation; and this is true regardless of whether the state court characterizes the rule as one of procedure or substantive law."

It is submitted that the doctrine of the *Tompkins* case, required the Circuit Court of Appeals in this case to

follow the State precedent on the question of the admission of evidence in *res ipsa loquitur* cases which so necessarily affect the substantive rights of the parties as to be decisive thereof.

The following is taken from the note in 128 A. L. R. 408, following the report of the case of *Sampson v. Channell, supra:*

> "It was held in Hagan & C. Co. v. Washington Water Power Co. (1938; C. C. A. 9th) 99 F. (2d) 614, that in an action in a Federal court sitting in Idaho, for the burning of the plaintiff's plant by reason of the alleged negligence of the defendant electric company, the law of Idaho governs the decision of the Federal court with respect to the appicability of the doctrine of res ipsa loquitur, under the doctrine of Erie R. Co. v. Tompkins, *and the United States Supreme Court cases following it.* (Italics ours.)
>
> "And it was held in Coca-Cola Bottling Co. v. Munn (1938; C. C. A. 4th) 99 F. (2d) 190, that the doctrine of res ipsa loquitur may, in a given case, materially affect the substantive rights of the parties (although in itself it is a part of the law of evidence, deals with the sufficiency of proof to raise an inference of negligence on the part of the defendant, and raises a prima facie case of liability of the defendants), and therefore, in the application of such doctrine, as in the application of the rules of substantive law under the decisions of the United States Supreme Court in Erie R. Co. v. Tompkins, and Ruhlin v. New York L. Ins. Co. (1938) 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860, the Federal District Court, in the exercise of its jurisdiction based on diverse citizenship, is bound by the state court adjudications. And the court further held

that even if the doctrine were regarded as a part of the law of evidence, and as strictly relating to procedure, as distinguished from substantive rights, the Federal court must follow the decision of the state court in passing upon the question of its applicability, for it is a well-settled rule that the Federal courts, in passing upon questions of evidence are bound to follow not only the statutes, but also the decisions of the highest court of the state where the trial takes place, and that decisions to the contrary seem to have been influenced by the previously accepted rule that decisions of the state court on questions of general law are not binding on the Federal courts—a rule no longer tenable in view of the overruling of Swift v. Tyson, in Erie R. Co. v. Thompkins."

So far as we have been able to ascertain, this Court has not passed upon the question raised above, although as hereinbefore pointed out, the Fourth and Ninth Circuit Courts of Appeals have established the law in those Circuits, and as contended for by us.

As stated in the case of *Empire State Cattle Co. v. Atchison, etc., R. Co.*, 210 U. S. 1, 7, 28 S. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70, this court should review the decision herein:

> "To consider the question which gave rise to a division of opinion in the Circuit Court of Appeals."

This Court in *In re Woods,* 143 U. S. 202, 206, 12 S. Ct. 417, 36 L. Ed. 125, said:

> "In the interest of jurisprudence and uniformity of decision—provisions were made—for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertance

of conclusion in controversies involving weighty and serious matters."

Inasmuch as the decisions upon the question are not in agreement, the following language of this Court in the case of *McMullen v. Hoffman,* 174 U. S. 639, 645, 19 S. Ct. 839, 43 L. Ed. 1117, is pertinent:

> "The cases upon the subject are not entirely harmonious, and we think it well to again consider some of them, and, so far as possible to remove the doubts which seemingly have arisen in this branch of the law."

This Court held in the case of *Spiller v. Atchison, etc., R. Co.,* 253 U. S. 117, 40 S. Ct. 466, 64 L. Ed. 810 (rev. 246 Fed. 1, 158 C. C. A. 227), that a judgment of a circuit court of appeals reversing a judgment of the district court and granting a new trial may be reviewed by the supreme court on *certiorari,* if the latter court deems it advisable to adopt this course without further protracting the litigation.

We respectfully urge that this Honorable Court should review the decision of the Circuit Court of Appeals in order to prevent a miscarriage of justice, to avoid a useless circuity of proceedings and to preserve a judgment lawfully acquired. To sanction a new trial in this case, by denial of this petition, will lead only to confusion and to further error if the trial court is required to follow the decision of the Circuit Court of Appeals.

In conclusion on this point, it is submitted that public interest will be promoted by the establishment by this

Court of a uniform rule of law with reference to whether or not the federal courts, and in particular whether the Tenth Circuit Court of Appeals, must follow as a rule of substantive law the decisions of the Utah Court with reference to pleading and proof in *res ipsa loquitur* cases, especially those involving accidents on passenger airliners engaged in interstate commerce, as is the situation in this case.

II.

The Circuit Court of Appeals Erred in Substituting Its Judgment for That of the Trial Court With Reference to the Competency of the Witness Lee.

The Circuit Court of Appeals in its decision here, held that the trial Court erred in refusing to permit the witness Lee to testify as to his opinion, with reference to whether the horizontal stabilizer or the wing tips failed first and in refusing to permit him to give his opinion as to the cause of the accident.

Aside from the fact, as we hereinbefore pointed out, under the topic last discussed, that such testimony with respect to specific negligence was not properly admissible under the pleadings in this case, we make the further contention that the judgment of the trial court with respect to the competency of the witness Lee as an expert was a determination of an issue of fact. The rule is based on the fact that the trial Court had the opportunity to see and observe the witness and appraised his qualifications.

THE DECISION TRANSGRESSES THE RULE THAT ERRORS IN THE ADMISSION OR EXCLUSION OF EVIDENCE MUST BE PREJUDICIAL BEFORE THE REVERSAL OF THE JUDGMENT OF THE TRIAL COURT IS JUSTIFIED.

A salient feature of the decision of the Circuit Court of Appeals is that there was not even an effort on the part of that Court to discuss whether or not the errors which they concluded were made in trial were in anywise prejudicial. The decision may be read from top to bottom without finding so much as an innuendo that the Court was able to find that the errors were prejudicial. The record will reveal, for example, that there was never any claim made on the part of plaintiff that there was any malfunction on the part of the engine, nor was there ever at any time, nor is there now, any claim, or possibility of claim, that there was an engine failure of any character or kind whatever. On the contrary, the evidence was, without contradiction, that with the exception of minor injury done in the crash, the engines were in perfect condition after the accident was over. How, then, can it possibly be said that the testimony of Mr. Welcher could have been helpful, even if it had been established (which it was not) that the plane which he heard was in fact the one which later crashed.

As to the cause of the accident, the opinion of the court below contradicts itself. It states, in one sentence:

> "It seems to be agreed that the accident was caused by a structural failure in flight."

and in the very next sentence says:

> "The appellee, however, significantly denies, and offers evidence to the effect, that the accident was not caused by any mechanical or structural defect in the plane, or any other cause within its control."[1]

The query must immediately present itself, what difference could the admission of Mr. Lee's evidence have made in the outcome of the case, if it was in fact "agreed that the accident was caused by a structural failure in the flight?" There is no question that not only once, but on several occasions, it was agreed and stipulated to by attorneys presenting this petition—stipulated to in open court—that the cause of the accident was the structural failure of the wingtips and the horizontal stabilizer. This not only was our stipulation, it was in fact our affirmative contention throughout the trial. Undoubtedly, it is because of the fact there was no issue as to the cause which brought the plane to earth, that the Tenth Circuit Court of Appeals found itself unable to point out that there was any error which was prejudicial, and the reason, therefore, why it did not even attempt to discuss this point.

The rule of law set down as applicable to this situation is amply expressed by Rule 61 of the New Rules adopted by this Court for civil procedure, which is as follows:

> "No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or

---

[1]The above sentence is patently inaccurate, but is taken from the printed copy of the decision as furnished counsel for petitioner.

> order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice.. The Court at every state of the proceeding must disregard any error or defect in the proceeding, which does not affect the substantial rights of the parties."

The rule of the Court below is in conflict with its own decision in the case of *Chicago & Northwestern Ry. Co. v. Golay, supra.*

There the discussion of the court related to testimony which it said was admissible concerning certain tests made by the Railway Company, stopping an automobile at the scene of the accident. In closing, the Tenth Circuit Court said:

> "But a careful examination of the entire record convinces us that its exclusion (that is, the exclusion of the admissible testimony) did not affect in any manner the ultimate verdict of the jury, and that the error was harmless.
>
> "The judgments are severally affirmed." (Parenthetical portion added.)

Likewise it is in diametric opposition to the comment of the Supreme Court of Utah in the case of *Neesley v. Southern Pacific Co.*, 35 Utah 259, 99 Pac. 1067. At page 267 of the Utah Report, the court said:

> "While some of the objections made by appellant's counsel were technically meritorious on the ground that the evidence was heresay, and therefore should have been excluded by the court, yet, in view of the

evidence introduced by respondent after the ruling of the court directly covering the point sought to be established by the evidence objected to, and, further, because there was no dispute with respect to such facts, we are clearly of the opinion that the appellant was not prejudiced by the rulings of the court."

Surely since, as the Court said in its opinion, all parties were agreed that the cause of the accident was failure in flight, the ruling of the Court refused to permit the witness Lee, even had he qualified himself sufficiently therefor, to testify as to which of the failures occurred first, is not material. It is not shown in the evidence at any point, nor is it contended by counsel for appellant below that it should be shown that *the sequence in which the fractures occurred had any significance whatever to the cause of the ~~action~~ accident or otherwise.*

The decision of the Court, without comment upon whether or not such prejudice was created, is in violation of all of the principles of well reasoned and understandable judicial opinion. It will tend to great confusion, which must necessarily continue until this Court has straightened out the tangle.

Conclusion.

It is respectfully submitted that the questions here involved are not mere passing elements of local interest, important only to one locality. Contrarily, aviation in its expansion has so accelerated the movement of traffic that every element of these, its early processes of litigation, are of great importance. It must be determined to what extent, if any, the doctrine of *res ipsa loquitur* applies! Whether or not, where a plane has fallen from

the sky, and all of the crew is killed, the operating airline is in any better position to determine what happened than the heirs of those who were killed with the crew. The doctrine of *res ipsa loquitur* is one of convenience. Should it be applied to aviation cases in all events, or only in those cases where the controlling members of the crew survive, so as to be able to impute to the operating company the knowledge out of which the doctrine of *res ipsa loquitur* originally grew? The Civil Aeronautics Board and Civil Auronautics Authority keep a constant and careful vigilance over the activities of commercial airlines. By the decision below it is indicated that the alleged "expert" was never so much as certificated for any purpose, except that of a "student flyer," by these ever careful regulatory institutions. If the decision below is permitted to stand, this type of litigation will be afflicted by second and third rate, or even fourth rate, "experts," who have had neither the ambition nor the ability to take or pass strict examinations required before aviation certification can be secured. We submit that it is to the public interest that the best of experts be required in the field of aerodynamics.

It is respectfully admitted that the Writ should be granted and that this Court should review the facts of this case and establish the law so that it will be understandable and easily followed.

ARTHUR E. MORETON,
FORREST A. BETTS,
Attorneys for Petitioner.

APPENDIX.

United States Circuit Court of Appeals, Tenth Circuit. No. 3221—May Term, 1946.

Hilda Ogden Bratt; Barbara Ann Bratt, a Minor, by her Guardian Ad Litem, Hilda Ogden Bratt; and Joan Nancy Bratt, a Minor, by her Guardian Ad Litem, Hilda Ogden Bratt, Appellants, vs. Western Air Lines, Inc., a corporation, Appellee.

Appeal from the United States District Court for the District of Utah, Central Division. [May. 20, 1946.]

William H. DeParcq (Parnell Black, Brigham E. Roberts, Robt. J. McDonald, and Donald T. Barbeau, were with him on the brief) for Appellants.

Forrest A. Betts and Arthur E. Moreton, for Appellee.

Before PHILLIPS, HUXMAN and MURRAH, Circuit Judges.

MURRAH, Circuit Judge, delivered the opinion of the court.

Hilda Ogden Bratt and her two minor children brought this action against the Western Airlines Corporation to recover damages for the death of their husband and father, Jack Raymond Bratt, who was killed while riding as a passenger in a plane owned and operated by Western Airlines. The complaint alleged "exclusive control and management" of the plane by the Airline Company, and the negligent and careless operation and maintenance of it as the proximate cause of deceased's death. Denying negligence, the Company alleged the dangers and perils necessarily incident to air travel, and averred that insofar as such risks and hazards are beyond control of human action and could not be compensated for by exercise of

the highest degree of care, they were assumed by the deceased at the time he purchased transportation on the airline. The case was submitted to the jury on the doctrine of *res ipsa loquitur*. A verdict was returned in favor of the Airline Company.[1] The errors assigned on appeal involve the admissibility of evidence, and the conduct of court and counsel in depriving appellants of a fair and impartial trial.

The evidence established the following undisputed facts: Flight No. 1 of the Western Airlines left the Salt Lake City Airport at about 1:05 A. M. on December 15, 1942, on its regularly scheduled flight from Salt Lake City to Los Angeles. At about 1:22 A. M., approximately three miles southeast of Fairfield, Utah, the plane crashed, killing the entire crew and thirteen passengers. The flight crew were all highly trained and qualified, and all testimony was to the effect that the air was smooth and weather conditions were favorable for the flight. It seems to be agreed that the accident was caused by a structural failure in flight. The appellee, however, specifically denies, and offered evidence to the effect that the accident was not caused by any mechanical or structural defect of the plane, *or any other cause within its control.*

In an attempt to show that a defective and unsafe right horizontal stabilizer of the plane was the proximate cause of the fatal accident, the appellants offered the evidence of Roland Marvin Lee, an aviation mechanic. After extensive examination and cross examination in qualifying the wit-

---

[1]Two other actions were also brought for wrongful death arising out of the same accident. They were submitted to the jury on the same facts, except the measure of damages, and a verdict for the Airline Company was returned in each case. The cases are here on one record presenting common questions.

ness as an expert, the following question was asked by counsel for appellants: "Now taking into consideration your own knowledge and experience and the evidence that I have mentioned—the weather records, the photographs, barograph card—and assuming the testimony of Lt. Gardner [sole survivor of the crash] to be true, *I will ask you whether or not you were able to form or express an opinion with a reasonable degree of certainty as to whether the right horizontal stabilizer and the elevator with it was the first part of the first section of this plane to fail in flight?*" The Court sustained an objection to the question on the grounds that the witness was not qualified to render such an opinion, and it is this ruling which the appellant contends was erroneous. (Italics ours.)

The question called for an expert opinion in the field of aerodynamics, and the examination of the witness Lee developed the following touching his qualifications as an expert on that subject: He became interested in aviation in 1927 and since that time has owned three planes of his own; he has flown numerous types of planes, including multi-engine and twin-engine aircraft, and has approximately eleven hundred air hours to his credit. The only time he has flown a DC-3 (the type here involved) was after it was taken into the air by a qualified pilot who let him then take the controls. He has never had a commercial pilot's license, but has held a private license and now holds a student's license. In 1943 he worked eleven months for Western Airlines as an "apprentice mechanic" and is not employed as an aviation mechanic by the Thompson Flying Service. His work with Western Airlines required a general knowledge of aircraft and as a part of his duties he did general maintenance work, including inspection and repairs. He has not been certified by Fed-

eral authorities and therefore never signed any Civil Aeronautics Authority forms as an official inspector, but made them out under the supervision of a licensed "A & E." He has studied the "C. A. A." manuals and Western Airline maintenance manuals and read other literature pertaining to the operation, maintenance and construction of DC-3 equipment. He has studied aerodynamics through study courses and classroom work, having attended a class at least once a week for over two years, in addition to manuals and books published for the "C. A. B." He stated that he had studied "load factors and structural aerodynamics"; that he knew metals and had experimented with heat alloy. He also examined the wreckage of the plane at the point of the accident. Over objections of counsel, the court permitted him to describe the purpose of ailerons, stabilizers and rudders, and to discuss the various parts and structures of an airplane with reference to their purpose and function in flight. In short, the court permitted him to testify concerning all the issues in the case except to express an expert opinion as to the cause of the accident.

"A witness is an expert witness and is qualified to give expert testimony if the judge finds that to perceive, know or understand the matter concerning which the witness is to testify, requires special knowledge, skill, experience or training and that the witness has the requisite special knowledge, skill, experience or training." Restatement Model Code of evidence, Sec. 402. "Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible, is a preliminary question for the judge presiding at the trial, and his decision is conclusive unless clearly shown to be erroneous as a matter of law." Stillwell Manufacturing

Co. v. Phelps, 130 U. S. 520; see also Montana R. Co. v. Warren, 137 U. S. 348; Spiller v. Atchison T. & S. Ry. Co., 253 U. S. 117; Lowe v. United States, 141 F. (2d) 981; Clark v. Hot Springs Electric Light & Power Co., 55 F. (2d) 615; Foster v. United States, 145 F. (2d) 877; Graham v. Ogden Union Ry. & Depot Co. (Utah), 6 P. (2d) 465, 467. Wigmore maintains that the trial court should be left to determine "absolutely and without review" the qualifications of a particular witness. Wigmore on Evidence, 2d Ed., Vol. 1, Sec. 561.

While it is not our province to review the discretion of the trial court, if exercised within legal bounds, it is our right and duty, we think, to determine whether in the exercise of the discretion committed to it, the trial court applied the correct legal standards.

The trial court's refusal to permit the witness to state his opinion concerning the cause of the accident, or concerning which part of the plane, in his opinion, structurally failed first, is apparently based on the impression that the witness must have either experienced an accident of this kind, to be an "expert who had figured it out mathematically and had taken into consideration every factor" that goes to the use of the various parts of an airplane.

If we leave the answer to those who have experienced an accident of this kind we would seldom find a solution, because as we all know, few ever survive to relate their experience. We have a fatal accident, the cause of which is seldom, if ever, susceptible of direct proof. The answer to our question therefore necessarily lies within the realm of scientific speculation, and can be answered by those who are specially qualified by experience, training and skill in matters relating to airplanes, their parts, pur-

poses and functions. If actual experience cannot be the test in cases of this kind, when then does a witness become qualified to testify from special experience concerning the scientific cause of an accident not susceptible of direct proof. There is no precise requirement as to the mode in which requisite skill or experience shall have been acquired. "A witness may be competent to testify as an expert, although his knowledge was acquired through the medium of practical experience rather than scientific study and research." Amer. Juris. Evidence, Vol. 20, 569.

The witness had no scholastic standing in the science of aerodynamics, but he was a man of practical experience who said he had made an actual study of the structural stress and strain of the parts of an airplane, and that based upon his examination of the wreckage at the point of the accident and other facts available to him, he had an opinion concerning which of the parts of the plane structurally failed first in flight, and was therefore the proximate cause of the accident. It may be that his testimony was of little value when judged by the substance of direct testimony, or when compared with the testimony of those whose opinions are steeped in the lore of scientific research. But, "the law does not require the best possible kind of a witness." Wigmore on Evidence, 2d Ed., Vol. 1, Sec. 569; Fightmaster v. Mode, 157 NE 407. The testimony of a country doctor concerning the sanity of his patient is as readily admissible as the testimony of the most renowned psychiatrist.

It must be remembered that the court is not the judge of the quality of the evidence, nor does the witness perform the function of a juror—he can only contribute something to the jury's information and if he can, he should be permitted to do so. Especially is this true, where as here

the answer to the crucial question is necessarily left to those claiming special knowledge based upon experience. If we close the door to testimony of this quality, in cases of this kind, we are brought to a point in the law of *torts,* as applied to aviation, where it would be impossible to prove a case except by the testimony of someone who actually experienced an accident of this kind, or who can base his opinion upon a scholastic background. We do not understand that such is, or should be, the policy of the law, and although we are most reluctant to disturb the ruling of the learned trial court, we are of the opinion that in determining the qualifications of the witness as an expert, it applied the wrong legal standards.

The appellants also complain of the court's exclusion of the testimony of one Welcher, a farmer living about five miles from the scene of the accident. He testified preliminarily that during the ten years he had lived at this place, he was in the habit of listening to the sounds of the motors of airplanes which passed over his home daily, and sometimes many times during the day; that on the evening of the accident in question, and at about the time it occurred, his attention was attracted by the sound of airplane motors passing over his home. The appellants offered to prove by this witness that at about the time this airplane would in the normal course of its flight pass over his home, he heard a noise of engines that was different from the usual and ordinary noise he had heard daily over a period of years. That in this particular instance the "motors would come and go off and the noise would come and go."

The court sustained an objection to this testimony on the grounds that there was no showing that the motors the witness heard were those of the plane in question, and for

the further reason that in the absence of a showing of the weather conditions and other factors entering into one's hearing on the ground five thousand feet below the plane, his lay opinion concerning the sound of the motors was a mere "guess" of what was happening to the plane in the air.

Counsel for appellant emphasized that the testimony of this witness was not offered as expert evidence as to the cause of the accident, but merely as a circumstance to aid the jury in determining the ultimate question peculiarly within its province. The trial court, however, apparently considered the proffer in the nature of expert testimony. All that was expected of the witness was a conclusion on a matter, knowledge of which could be gained by the ordinary experience of any layman. To state whether or not the witness detected anything abnormal about the sound of the airplane motors would not call for special training and experience in the science and mechanics of airplane motors. The questions did not go that far—it was merely offered for whatever aid it might be to the jury. The extent of the witness' knowledge of the matters about which he offered to testify, effected only the weight of his testimony, not its admissibility. See Wigmore on Evidence, 2d Ed., Vol. 1, Secs. 556-7-8-9. We think the witness should have been permitted to testify in this limited capacity.

Since in our view the case must be remanded for a new trial, we deem it appropriate to remind counsel that sarcastic witticisms designed to provoke ridiculous impressions have no place in the orderly conduct of a trial in

Federal court and should not be tolerated. It is enough to say that the conduct of counsel did not, in our judgment, comport with the ideals of professional decorum. We indulge in the expectation that the case will be retried in an atmosphere more conducive to the administration of justice.

The case is reversed and remanded with directions to proceed in accordance with the views herein expressed.

A true copy.

Attest:

Clerk U. S. Circuit Court of Appeals, Tenth Circuit.

FILE COPY

FILED
SEP 16 1946
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

October Term, 1946.

No. 476

WESTERN AIRLINES, INC., a Corporation,
Petitioner,

vs.

HILDA OGDEN BRATT; BARBARA ANN BRATT, a Minor, by Her Guardian ad litem, Hilda Ogden Bratt; JOAN NANCY BRATT, a Minor, by Her Guardian ad litem, Hilda Ogden Bratt,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING CERTIORARI

WILLIAM H. DEPARCQ,
PARNELL BLACK,
Counsel for Respondents.

Of Counsel:
ROBT. J. McDONALD,
DONALD T. BARBEAU,
BRIGHAM E. ROBERTS.

Hayward-Court Brief Printing Co., Minneapolis 15, Minn.

INDEX

		Page
I.	Preliminary statement	1
II.	Pleadings, evidence and instructions	2
	A. Pleadings	2
	B. The evidence	3
	C. The court's instructions	7
III.	The argument	7
	A. No question with respect to res ipsa loquitur is involved	7
	B. The Circuit Court of Appeals properly held that the trial court applied erroneous legal standards in rejecting Lee's testimony	10
	C. The Circuit Court of Appeals properly held that the testimony of the witness Welcher was admissible	16
IV.	Conclusion	18

CASES CITED

Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 215 U. S. 216, 30 S. Ct. 86 10

Battle Creek Bread Wrapping Mach. Co. v. Paramount Baking Co., 88 Utah 67, 39 Pac. (2d) 323 11

Bramen-Johnson Flying Service, Inc., v. Thomson, 167 Misc. 167, 3 N. Y. Supp. (2d) 602 9

Carr v. Cranney, 24 Utah 193, 70 Pac. 853 11

Clarke v. Hot Springs Elec. Light & Power Co., et al., 52 F. (2d) 612 10

Clark v. Los Angeles & Salt Lake R. Co., 73 Utah 486, 275 Pac. 582 11

Clark, et al., v. Horowitz, et al., 293 Pa. 441, 143 Atl. 131 16

City Council of Montgomery v. Gilmer & Taylor, 33 Ala. 116, 70 Am. Dec. 562 16

Coon v. Shields, 88 Utah 76, 39 Pac. (2d) 348 11

Dearden v. San Pedro L. A. & S. L. R. Co., 33 Utah 147, 93 Pac. 271 14

Denver v. Atchison, Topeka & Santa Fe Ry. Co., 96 Kan. 154, 150 Pac. 562 15

English v. Miller (Tex. Civ. App.), 43 S. W. (2d) 642 9

Ex Parte Siebold, 100 U. S. 371, 398 10

Fightmaster v. Mode, 31 Ohio App. 273, 167 N. E. 407 15

Fosbroke-Hobbes v. Air Work, Ltd., & British American Air Service, Ltd., 1938 U. S. Av. R. 194 (High Court of Justice, King's Bench Div., Dec. 21, 1936) (53 T. L. R. 254, 81 Sol. J. 80) 9

General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175, 58 S. Ct. 849 10

Genero v. Ewing, 178 Wash. 78, 28 Pac. (2d) 116 9

Germania Life Insurance Co. v. Ross-Lewin, et al., 24 Colo. 43, 51 Pac. 488 15

Golder v. Lund, 50 Neb. 867, 70 N. W. 379 16

Page

Helvering v. Fuller, 310 U. S. 69, 90 S. Ct. 784 2
Kay v. United States, 303 U. S. 1, 58 S. Ct. 468 2
Keller v. Potomac Electric Power Co., 261 U. S. 428, 43 S. Ct. 445 .. 10
Kentucky Public Service Co. v. Topmiller, 204 Ky. 196, 263 S. E. 706 16
Kitchens v. State (Ala. App.), 14 S. (2d) 739 16
Lambert v. Virginian Ry. Co., 96 W. Va. 158, 122 S. E. 457 15
Lanasa Fruit S. S. & Imp. Co., Inc., v. Universal Ins. Co., 302 U. S. 556, 58 S. Ct. 371 2
Lestico v. Kuehner, 204 Minn. 125, 283 N. W. 122 15
Loos v. Mountain Fuel Supply Co., 99 Utah 496, 108 Pac. (2d) 254 14
Macon Ry. & Light Co. v. Mason, 123 Ga. 773, 51 S. E. 569 16
Malone, et al., v. Trans-Canada Airlines, 1942 U. S. Av. R. 144 (Dominion of Canada, Province of Ontario, Court of Appeals) (3 D. L. R. 369-1942) 9
Malone-McConnell Real Estate Co. v. J. B. Simpson Audit Co., 197 Ala. 677, 73 So. 369 15
McCusker v. Curtis-Wright, Inc. (1933), 264 Ill. App. 502 9
Muskeget Island Club v. Town of Nantucket, 185 Mass. 303, 70 N. E. 601 15
Muskrat v. U. S., 219 U. S. 346, 31 S. Ct. 250 10
Olson v. O. S. L. R. Co., 24 Utah 460, 68 Pac. 148 11
Owens v. Union Pacific R. Co., 319 U. S. 715, 63 S. Ct. 1271 2
Pearson, et al., v. Zehr, 138 Ill. 48, 29 N. E. 854 16
Peck v. New York Central & H. R. R. Co., 165 N. Y. 347, 59 N. E. 206 15
People v. Rice, 159 N. Y. 400, 54 N. E. 48 16
People v. Cox, 340 Ill. 111, 172 N. E. 64 16
Pridgen v. Gibson, 194 N. C. 289, 139 S. E. 443 15
Provo River Water Users Ass'n v. Carlson, et al., 103 Utah 93, 133 Pac. (2d) 777 11
Selby v. Osage Torpedo Co., 112 Okla. 203, 241 Pac. 131 16
Seaman v. Curtiss Flying Service, Inc., 247 N. Y. Supp. 251, 231 App. Div. 867 9
Smith v. O'Donnell, 215 Cal. 714, 5 Pac. (2d) 690, 12 Pac. (2d) 933 9
Smith v. Pacific Alaska Airways, Inc., 89 F. (2d) 253 9
State of Alabama v. State of Arizona, 291 U. S. 286, 54 S. Ct. 399 .. 10
State Line & S. R. Co. v. Phillips, 98 F. (2d) 651 (3 C. C. A.) 15
Stillwell Mfg. Co. v. Phelps, 130 U. S. 520, 9 S. Ct. 601 10
United States v. Johnston, 268 U. S. 220, 45 S. Ct. 496 10
Walkenhorst v. Kesler, 92 Utah 312, 67 Pac. (2d) 654 11
Wooton v. Dragon Consolidated Mining Co., 54 Utah 459, 181 Pac. 593 11
Wright v. Southern Pacific Co., 15 Utah 421, 49 Pac. 309 11

TEXT BOOK CITED

Jones, Commentaries on Evidence, Vol. 3, Secs. 1314, 1315, 1316, 1318 16

In the Supreme Court of the United States

October Term, 1946.

No. .....

WESTERN AIRLINES, INC., a Corporation,
Petitioner,

vs.

HILDA OGDEN BRATT; BARBARA ANN BRATT, a Minor, by Her Guardian ad litem, Hilda Ogden Bratt; JOAN NANCY BRATT, a Minor, by Her Guardian ad litem, Hilda Ogden Bratt,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING CERTIORARI

I.

PRELIMINARY STATEMENT

(Figures in parentheses refer to pages of the record.)

The petition and brief are replete with false statements. They are wholly unreliable to inform this Court as to the sole question involved upon the present application, which relates to an evidentiary ruling. Neither the doctrine of *res ipsa loquitur,* nor the sufficiency of the evidence to invoke it, nor the propriety of the court's instructions with reference thereto is involved.

This Court will not render advisory opinions and will confine itself to the questions presented to the Circuit

Court of Appeals. *Owens v. Union Pacific R. Co.*, 319 U. S. 715, 63 S. Ct. 1271; *Helvering v. Fuller*, 310 U. S. 69, 60 S. Ct. 784; *Kay v. United States*, 303 U. S. 1, 58 S. Ct. 468; *Lanasa Fruit S. S. & Imp. Co., Inc., v. Universal Ins. Co.*, 302 U. S. 556, 58 S. Ct. 371. Therefore, we will proceed to make clear the issues as presented by the pleadings in both the trial court and the Circuit Court of Appeals.

II.

PLEADINGS, EVIDENCE AND INSTRUCTIONS

A. The Pleadings.

It is asserted throughout the petition and brief that the plaintiffs alleged only a cause of action under the doctrine of *res ipsa loquitur*. It is emphasized that the sole charge of negligence contained in the complaint is one under the doctrine of *res ipsa loquitur*. This is not true and, therefore, we desire to call attention to the charges of negligence contained in the complaint upon which the cause was tried below.

The complaint consists of two separate and distinct counts. The first count sets forth a cause of action on grounds of general negligence under *res ipsa loquitur* and is based solely upon that ground. The second count alleged negligence in general terms but not under the doctrine of *res ipsa loquitur*. Count two alleges negligence as follows:

> "That the defendant negligently and carelessly managed, maintained, operated and controlled said airplane and its said airline and its equipment and the conduct of said flight * * *" (R. 5).

This pleading was not attacked by defendant at any stage of the proceedings. There was no motion to make it more specific and certain.

The position of the plaintiffs was understood both by court and counsel and was made perfectly clear in the following colloquy at a pre-trial conference (R. 39):

"The Court: No, I am not asking you to elect; I am simply asking what your state of mind is.

Mr. DeParcq: My state of mind is this: that we will show the facts and circumstances surrounding this accident. We will then also offer expert evidence with reference to its cause in aid and in explanation of the factual background; and it will be our contention, I believe, when the evidence closes and the record is finished, that we have adduced sufficient evidence to permit this case to go to the jury on specific negligence. But certainly if not, then we may fall back on the doctrine of *res ipsa loquitur* in line with the *Loos* case.

"The Court: And so that the issues are about as I stated them a while ago?

Mr. DeParcq: That is right, your Honor."

B. The Evidence.

The accident out of which this wrongful death action arose occurred at about 1:22 a. m. on December 15, 1942, at approximately three miles southeast of Fairfield, Utah.

The airplane was a Douglas DC-3 manufactured in December, 1936, and a total of 14,773 hours of flying time had been logged for the airplane (R. 214). The plane was not only the oldest one in the service of the defendant but was four or five times older than any other plane owned and operated by the defendant during December, 1942 (R. 214). The operating statistics of the defendant establish that at and before the time of the accident the Western Airlines, with only about half the number of planes in service, was carrying a substantially larger payload with respect to passengers, mail and express, than in previous years (R. 213, 214).

All the evidence established that at the time and place of the accident the weather conditions were ideal for flying (R. 381). The government meteorologist testified that everything indicated stable air conditions and ceiling and visibility unlimited (R. 92, 93-96), not only at the time of the accident but for two days prior thereto (R. 103). The data for Fairfield at 1:30 a. m. indicated a stable air mass and winds only light to gentle (R. 66, 67). The defendant's records show an "easterly flow of dry stable air" and ceiling and visibility unlimited (R. 263, 264). One of the defendant's captains went over the same route at 11:29 p. m. and reported in his flight log that the air was smooth (R. 350, 351).

The accident was described in the deposition of Captain Gardner, a survivor of the crash. He was seated in the third seat from the front on the left side, just over the trailing edge of the left wing, and after a normal take-off he settled back and dozed off and was semiconscious (R. 122). He was awake enough so that he was aware of the stewardess walking back to the rear of the cabin at one time, and noticed that the "No Smoking" sign was turned off. There was nothing unusual until he was brought up sharply to keen awareness by a very sharp pull-up and maneuver of the airplane with a sudden acceleration in an upward direction (R. 123). He realized that there was something in the nature of an emergency (R. 123). He knew that commercial planes were not handled in that fashion except in case of emergency (R. 131). The pull-up was very sharp. He was caused to sit down heavily in his seat and had the sensation of his cheeks dropping and his mouth wanting to fall open and his ears sliding down the side of his head (R. 123). He could not have stood up (R. 123, 124). The pull-up continued for a few seconds, during which time he ripped open the curtain to look outside (R. 124). The

airplane started to shake as though beginning to stall; there was a noise in the vicinity of the left engine which sounded like a thump; the plane just nosed over gently and continued in a stalled attitude, shaking all the way and continuing in a mushing flight with a turn to the left until the point of impact (R. 124). It was in a skidding left turn (R. 124).

When he first became aware of the unusual maneuver the first thing he did was tighten his safety felt as far as it would go (R. 124). The plane seemed to descend without interruption in a skidding left turn (R. 125). There was a certain amount of shuddering throughout the aircraft (R. 126).

While Captain Gardner could not commit himself absolutely, yet he believed that the sign which says, "Tighten Safety Belts," was turned off a short time after the take-off (R. 129) and he did not observe it turn on again up to the time of the crash. The stewardess did not say anything or issue any warnings about tightening safety belts after the pull-up and before the crash (R. 131). Defense counsel conceded that it was only because Gardner jerked his belt tight that he survived the ordeal (R. 725). The pull-up was extremely abrupt (R. 131). When he looked out it was clear and the moon was shining and visibility and ceiling were generally unlimited (R. 132). The flight seemed to be smooth before the pull-up and he had no recollection of its being bumpy or of any down-drafts or up-drafts (R. 134). It was a matter of two or three minutes from the time of the pull-up until the impact. While the left engine seemed a little rough he could not be absolutely sure (R. 138).

It was established, in fact admitted by the chief pilot of the defendant, that there were only three possible causes of the accident, to-wit:

1. Either some maneuver by the crew members, or
2. Something defective with reference to the condition of the plane and its various parts, or
3. Weather conditions (R. 193).

The evidence overwhelmingly eliminated the weather as a probable cause. An investigation failed to disclose the presence of any other aircraft in the immediate vicinity of the accident at the time (R. 193-5). There was no evidence in the record of any contact or collision with any plane or object in the air (R. 195). In the opinion of the chief pilot the evidence pointed to a structural failure rather than some other cause (R. 195).

It appeared without dispute that the left wing tip and the right horizontal stabilizer failed in the air and that the plane was in the process of disintegrating before reaching the ground. Pieces of fabric and glass were found a distance of from 1,500 to 2,000 feet from where the plane came to earth (R. 58). Counsel for the defendant conceded that the fractures were such that they had to occur, in part at least, in the air (R. 59, 299).

While it was admitted that there was a structural failure in the air, yet there was no agreement, in fact a sharp dispute, as to what caused the structural failure. It was the defendant's position that the accident may have been caused by a flock of birds, another aircraft, an up-draft or down-draft, or some other emergency, not due to defective equipment, which confronted the pilots (R. 715, 716). The plaintiff, on the other hand, offered expert evidence to prove that the accident was caused by an unsafe, defective and dangerous right horizontal stabilizer, and this testimony will be discussed later (R. 339).

C. The Court's Instructions.

It is stated by petitioner that the trial court submitted the case to the jury solely under the doctrine of *res ipsa loquitur*. This likewise is not true. In fact, the court, after submitting the case under the doctrine of *res ipsa loquitur* and explaining that doctrine expressly said in its instructions (R. 760):

> "But that is not the only ground that the plaintiffs rely upon in these cases for recovery. It is claimed and charged in the complaint that there was negligence in the operation of the plane. By operation is meant the flight of the plane at that time as made by the pilot and co-pilot on the plane."

Thus it will be seen that neither court nor counsel interpreted the complaint as limiting the charges of negligence solely to the doctrine of *res ipsa loquitur*. It may be noted that there was no exception taken by either party to the court's charge (R. 777).

III.

THE ARGUMENT

A. No Question With Respect to Res Ipsa Loquitur Is Involved.

This Court in Rule 38, Section 5, has set forth the grounds which warrant a writ of certiorari and while the grounds are not controlling and do not limit the court's discretion, yet they are indicative of the reasons which will be considered of sufficient importance to invoke this Court's supervision. The order or judgment here under review is not final. While this is not fatal to jurisdiction, yet we believe the defendant should not be permitted to seek review of an evidentiary ruling of this character before it has been applied prejudicially to its interests.

We propose to demonstrate that none of the grounds or reasons which this Court has specified as warranting a writ of certiorari exist in the case at bar.

The defendant's brief is calculated to obscure rather than to clarify the questions raised by this petition. In the Circuit Court of Appeals the plaintiffs—respondents here—on page 9 of their brief stated that the sufficiency of the evidence to warrant the submission of *res ipsa loquitur* was not involved. In its brief, agreeing that the doctrine was not involved, the petitioner—defendant—on page 2 thereof stated:

> "As appellants indicate at page 9 of their brief, no question of specific negligence of the defendant was raised by any of the evidence presented. The case was submitted to the jury solely on the doctrine of *res ipsa loquitur*. The sufficiency of the evidence to warrant its submission to the jury is not involved in the present appeal. Despite this admission by the appellants, the brief at page 13 contains an argument as to the applicability of the doctrine of *res ipsa loquitur* to the present case. This argument appears to be entirely inapplicable, immaterial, and out of place."

A certified copy of the brief of the appellee, petitioner here, containing the above paragraph has been filed with the clerk of this Court. It will thus be seen that the petitioner here, now seeking to invoke the powers of this Court to determine the applicability of the *res ipsa loquitur* doctrine, took precisely the opposite position in the court below.

No question of conflict of laws has arisen or could arise at any stage of the proceedings. Both parties and the trial court agreed that the doctrine of *res ipsa loquitur* as established in the state of Utah was the governing law, whether substantive or procedural. The implications of the case of *Erie R. Co. v. Tompkins* were not involved. The parties have been and are now in en-

tire harmony that the governing law is that of the state of Utah.

Although the question is not here involved, we might observe that while the authorities are in conflict with reference to the application of *res ipsa loquitur* to a private plane where the passenger has access to the controls, yet they are uniform in applying the doctrine to a common carrier by air and its passenger where the aircraft is in scheduled commercial flight, and, admittedly, under the sole dominion and control of the defendant and its agents and servants, and where, as here, the accident is one which according to the testimony of the defendant's officials would not and should not happen if those having the ownership, inspection, maintenance and operation of the plane exercised the proper degree of care (R. 153).

Smith v. Pacific Alaska Airways, Inc., 89 F. (2d) 253;

Seaman v. Curtiss Flying Service, Inc., 247 N. Y. Supp. 251, 231 App. Div. 867;

Smith v. O'Donnell, 215 Cal. 714, 5 Pac. (2d) 690, 12 Pac. (2d) 933;

McCusker v. Curtis-Wright, Inc. (1933), 264 Ill. App. 502;

English v. Miller (Tex. Civ. App.), 43 S. W. (2d) 642;

Bramen-Johnson Flying Service, Inc., v. Thomson, 167 Misc. 167, 3 N. Y. Supp. (2d) 602;

Genero v. Ewing, 178 Wash. 78, 28 Pac. (2d) 116;

Fosbroke-Hobbes v. Air Work, Ltd., & British American Air Service, Ltd., 1938 U. S. Av. R. 194 (High Court of Justice, King's Bench Div., Dec. 21, 1936) (53 T. L. R. 254, 81 Sol. J. 80);

Malone, et al., v. Trans-Canada Airlines, 1942 U. S. Av. R. 144 (Dominion of Canada, Province of Ontario, Court of Appeals) (3 D. L. R. 369-1942).

In order to grant a writ in this case to discussand solve questions not raised or involved either in the rial court or in the Circuit Court of Appeals the Supeme Court would have to render a purely advisory opiion. This Court does not render advisory opinions and dtermines only real controversies of grave importace. *Muskrat v. U. S.*, 219 U. S. 346, 31 S. Ct. 250; *Kellr v. Potomac Electric Power Co.*, 261 U. S. 428, 43 S. Ct. 45; *State of Alabama v. State of Arizona*, 291 U. S. 286, 54 S. Ct. 399; *Baltimore & Ohio R. R. Co. v. Intertate Commerce Commission*, 215 U. S. 216, 30 S. Ct. 86; *Ex Parte Siebold*, 100 U. S. 371, 398.

This Court does not review decisions or judgments based solely on questions of fact such as a ruling of the trial court or an instruction by the trial court. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 58 S. Ct. 849; *United States v. Johnston*, 268 U. S. 220, 45 S. Ct. 496.

B. The Circuit Court of Appeals Properly Held That the Trial Court Applied Erroneous Legal Standards in Rejecting Lee's Testimony.

There can be no possible dispute concerning the universal principle stated by this court in *Stillwell Mfg Co. v. Phelps*, 130 U. S. 520, 9 S. Ct. 601:

> "Whether a witness called to testify to any matter of opinion, had such qualifications and knowledge as to make his testimony admissible, is a preliminary question for the judge presiding at the trial, and his decision is conclusive unless clearly shown to be erroneous as a matter of law."

In accord the Tenth Circuit Court of Appeals held in *Clarke v. Hot Springs Elec. Light & Power Co., et al.*, 52 F. (2d) 612, that the trial court on a matter of this kind will be reversed only in the event of: (1) a plain

error of law or (2) a serious mistake of fact, or (3) abuse of discretion. The law of Utah is in harmony with the principles expressed by this court and by the Circuit Court of Appeals as will be established by the following authorities:

Wooton v. Dragon Consolidated Mining Co., 54 Utah 459, 181 Pac. 593;

Clark v. Los Angeles & Salt Lake R. Co., 73 Utah 486, 275 Pac. 582;

Carr v. Cranney, 24 Utah 193, 70 Pac. 853;

Olson v. O. S. L. R. Co., 24 Utah 460, 68 Pac. 148;

Wright v. Southern Pacific Co., 15 Utah 421, 49 Pac. 309;

Walkenhorst v. Kesler, 92 Utah 312, 67 Pac. (2d) 654;

Coon v. Shields, 88 Utah 76, 39 Pac. (2d) 348;

Battle Creek Bread Wrapping Mach. Co. v. Paramount Baking Co., 88 Utah 67, 39 Pac. (2d) 323;

Provo-River Water Users Ass'n v. Carlson, et al., 103 Utah 93, 133 Pac. (2d) 777.

The offer of proof which the trial court rejected will be found on page 339 of the record. It is quite lengthy and detailed, but the witness Lee, had he been permitted by the court, would have testified that in his opinion the right horizontal stabilizer was in a defective, unsafe and dangerous condition, and that otherwise it would not have failed. The plaintiff offered to prove by this witness that the defective condition of the right horizontal stabilizer was the cause of the accident and initiated the other sequence of events (R. 339). The offer of proof included the sequence of events and the reasons of the witness for his opinion. The opinion was to be based upon a close and personal inspection of the records, the wreckage of the plane, the photographs, the barograph card, and the testimony of Captain Gardner. The ex-

perience of the witness which qualified him to express the opinion was as follows:

He was an aviation mechanic in the employ of the Thompson Flying Service at Salt Lake City (R. 272). His interest in aviation started in 1927, and he had flown numerous types of planes, including multi-engine and twin-engine aircraft (R. 272). He had approximately 1,100 hours of flying in the air (R. 272). He had owned three planes of his own, and listed some twelve or thirteen types of planes he had flown (R. 303). He had experienced stalls and spins in the air and recovered therefrom (R. 307). He had done stunting and acrobatic flying (R. 308). He had handled planes under circumstances where he had put stress and strain on the wings and stabilizers (id.).

He had worked for Western Airlines for about eleven months as an apprentice mechanic and as a shop specialist (R. 273). While employed by the defendant he did general maintenance work on aircraft, including inspections and repairs (R. 275). Western Airlines changed his position from that of an apprentice mechanic to a shop specialist and gave him more responsibility (R. 306). The latter job required a knowledge of stresses and strains of materials. As a part of his work at Western Airlines he made inspections for the purpose of determining evidence of stress and strain on wings and stabilizers (R. 314, 315). Prior to his work with Western Airlines he had previous experience and training as a welder and a sheet metal worker, and was, therefore, transferred to the army school training work while at Western Airlines (R. 275). The work he was doing at the Thompson Flying Service was substantially the same and this was a licensed repair station under the C. A. A. and he worked on any type of a plane (R. 275).

The witness was familiar with the various parts and structures of an airplane with reference to their purpose

and function in flight (R. 280-283). He had studied the C. A. A. manual and the Western Airlines maintenance manual and a lot of literature pertaining to the operation, construction and maintenance of DC-3 equipment (R. 289). At Western Airlines it was a part of his work to make Nos. 1, 2 and 3 inspections on this equipment (R. 289). He made inspections to determine air worthiness.

The witness Lee had studied metals and had experience with heat treated alloy (R. 332). He had studied manuals with reference to the construction of the DC-3 (R. 333). He testified that he had studied load factors and structural aero-dynamics, and that given proper tools and equipment, he could determine how to construct a piece of alloy to produce certain resistance, and that he believes that he could figure out the weight stresses of a bridge (R. 338).

It appeared that in addition to his flying experience, work as a mechanic and general knowledge of aviation, he had studied aero-dynamics and had taken an adult course in the subject offered by the Civil Air Patrol at Salt Lake City. He had been a member of the school class for over two years, attending at least once a week for a two-hour period (R. 306). He did the very same work at Western Airlines that was done by mechanics with an AE license (R. 308, 309), and he had all the qualifications to obtain one but had never taken the examination (R. 310).

The exclusionary ruling of the trial court prevented the plaintiffs from offering evidence of the defective and unsafe condition of the plane. Such evidence was admissible under count two of the complaint which alleged, in part, that the defendant negligently maintained its plane and equipment (R. 5).

The proferred testimony was also admissible under the doctrine of *res ipsa loquitur* even though no other

count had been contained in the complaint. This was definitely held by the Utah Supreme Court in *Dearden v. San Pedro L. A. & S. L. R. Co.*, 33 Utah 147, 93 Pac. 271, and *Loos v. Mountain Fuel Supply Co.*, 99 Utah 496, 108 Pac. (2d) 254. In the former case, which is directly in point, the court said:

> "That the plaintiff averred and undertook to show a defective brake chain as evidence of negligence causing the collision, did not waive nor affect the presumption of negligence arising from the circumstances, which was in itself sufficient to show such negligence. A relevant fact may frequently be proved in several different ways. The circumstances from which the presumption referred to arose were evidence for plaintiff of the fact of defendant's negligence causing the collision. The evidence of a defective brake chain which the plaintiff produced was also some proof of such negligence, and was in aid of and not adverse to the presumption. Though he had failed in such proof, the presumption of negligence which had been shown to exist independent thereof was in no wise displaced nor weakened."

Significant here is Rule 43 (a) of the Rules of Civil Procedure which provides that the admissibility of evidence is governed by the rule applied in federal courts or in the courts of the state in which the federal court sits, whichever favors its reception. The rule specifies, "In any case, the statute or rule which favors the reception of the evidence governs."

The principal objection urged against Lee's qualifications was that he did not have an AE license (R. 310). The trial court was under the impression that in order to qualify it would be necessary to have an expert engineer who had studied the effects of air at different angles and all that sort of thing (R. 296). The court labored under the error or misconception of law that, inasmuch as the plaintiffs relied upon *res ipsa loquitur*, expert evidence should not be received (R. 311). The objections made by

the defendant, and sustained by the Court, were based upon the theory that Lee did not have a license, had not flown DC-3 equipment, and had never been through an accident of this kind (R. 292-338).

Thus the ruling of the trial court was clearly shown to be erroneous as a matter of law. This is what was meant by the Circuit Court of Appeals in stating that the ruling was made under the wrong legal standard. It is thoroughly settled that the absence of a license in a particular field is not fatal to the qualifications of an expert witness. It is likewise thoroughly established that if the witness has gained his knowledge of the subject from study, observation and experience, it is not necessary that he be licensed by any particular board or bureau having jurisdiction over the field involved. The knowledge may be gained by study and study alone. It may be gained from experience and experience alone. It may be gained, as here, from a combination of both.

Fightmaster v. Mode, 31 Ohio App. 273, 167 N. E. 407;

Germania Life Insurance Co. v. Ross-Lewin, et al., 24 Colo. 43, 51 Pac. 488;

Muskeget Island Club v. Town of Nantucket, 185 Mass. 303, 70 N. E. 601;

State Line & S. R. Co. v. Phillips, 98 F. (2d) 651 (3 C. C. A.);

Lestico v. Kuehner, 204 Minn. 125, 283 N. W. 122;

Pridgen v. Gibson, 194 N. C. 289, 139 S. E. 443;

Peck v. New York Central & H. R. R. Co., 165 N. Y. 347, 59 N. E. 206;

Malone-McConnell Real Estate Co. v. J. B. Simpson Audit Co., 197 Ala. 677, 73 So. 369;

Lambert v. Virginian Ry. Co., 96 W. Va. 158, 122 S. E. 457;

Denver v. Atchison, Topeka & Santa Fe Ry. Co., 96 Kan. 154, 150 Pac. 562;

Macon Ry. & Light Co. v. Mason, 123 Ga. 773, 51 S. E. 569;
Clark, et al., v. Horowitz, et al., 293 Pa. 441, 143 Atl. 131;
People v. Rice, 159 N. Y. 400, 54 N. E. 48;
People v. Cox, 340 Ill. 111, 172 N. E. 64;
Golder v. Lund, 50 Neb. 867, 70 N. W. 379;
Kitchens v. State (Ala. App.), 14 S. (2d) 739;
Kentucky Public Service Co. v. Topmiller, 204 Ky. 196, 263 S. E. 706;
City Council of Montgomery v. Gilmer & Taylor, 33 Ala. 116, 70 Am. Dec. 562;
Selby v. Osage Torpedo Co., 112 Okla. 203, 241 Pac. 131;
Pearson, et al., v. Zehr, 138 Ill. 48, 29 N. E. 854;
Jones, Commentaries on Evidence, Vol. 3, Secs. 1314, 1315, 1316, 1318.

C. The Circuit Court of Appeals Properly Held That the Testimony of the Witness Welcher Was Admissible.

Captain Gardner testified that if the safety belt sign had been turned on during the emergency, and if there was a spot of illumination up there, he would have noticed it and that is his reason for saying it was off (R. 129, 130). He never again observed either sign turned on up to the time of the crash (R. 130). None of the crew came back into the cabin during the two or three minutes involved and the stewardess did not issue any warning about tightening safety belts (R. 130-131).

It will be recalled that Captain Gardner made such a complete recovery that he returned to his service in the Marines in the South Pacific (R. 120). Defense counsel concedes that Captain Gardner survived this awful ordeal because and only because he tightened his safety belt as tight as it would go (R. 725). It may well be that if a

proper warning had been issued to the other passengers so that they could have tightened their safety belts they, too, would be alive today.

The witness Welcher explained that for ten years before the accident he had noticed planes flying over his home and had heard those planes every day (R. 169, 173). He had been listening to the sound of the different planes and motors and that is what drew his attention to this plane (R. 170). He went to the scene of the wreckage the next day (R. 170). He testified to circumstances which would indicate that this particular plane must have been the one which he heard during the night. The time, the place, and the circumstances were such as to practically exclude any other probability. It should be recalled that an investigation was conducted by the Civil Aeronautics Administration, the War Department and the defendant, and no other aircraft was found to have been in the vicinity at the time and place involved.

Hence, if this plane were in trouble and the motors were being speeded up by those in charge in an effort to establish control of it at a time when it was five miles north of Fairfield, then it may well be that the pilots or the stewardess, or both, were guilty of negligence in failing to issue a warning to the passengers to tighten their safety belts. In any event, this testimony established merely a circumstance with reference to the time and place of the trouble that was proper to consider in connection with the general background.

Inasmuch as the Circuit Court of Appeals based the reversal here principally upon the exclusion of Lee's testimony, and not Welcher's, the matter does not assume any controlling importance.

IV.

CONCLUSION

There is here no great principle of law at stake—no need for its establishment or clarification. The authorities with reference to the qualifications of an expert witness present neither doubt nor conflict, and the only problem arises from the application of established principles to divers and varying fact situations.

The decision below neither establishes a new principle nor clarifies an old one. Its affirmance or reversal here likewise would do neither.

It is respectfully submitted, therefore, that this petition falls far short of presenting the special and important reasons for a writ of certiorari required by the rules of this Court.

Respectfully submitted,

WILLIAM H. DEPARCQ,
PARNELL BLACK,
Counsel for Respondents.

Of Counsel:
ROBT. J. McDONALD,
DONALD T. BARBEAU,
BRIGHAM E. ROBERTS.